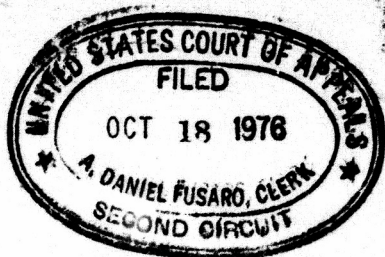


***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**



76-7420

United States Court of Appeals

FOR THE SECOND CIRCUIT

SOLOMON CATES, *et al.*,

Plaintiffs-Appellants,

VS.

TRANS WORLD AIRLINES, INC., *et al.*,

Defendants-Appellees.

CIVIL ACTION No. 73 Civ. 5487 (CLB)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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STATEMENT OF THE ISSUES

- I. Whether the plaintiffs, having at present an employment status inferior to white co-workers who applied for employment contemporaneously with them because of their race, have sufficiently alleged continuing violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., so as to render their administrative charges to the Equal Employment Opportunity Commission timely filed?
- II. Whether the plaintiffs, having alleged present harm to themselves and other black pilots in the defendant company's employ resulting from the operation of the defendants' seniority system, have sufficiently alleged acts of racial discrimination occurring within the applicable statute of limitations accorded 42 U.S.C. §1981?
- III. Whether the plaintiffs have sufficiently stated in their complaint a cause of action under the "duty of fair representation" owed to them by the defendants through the operation of 45 U.S.C. §151 et. seq.?

STATEMENT OF THE CASE

This is an appeal from an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., the Civil Rights Act of 1866, 42 U.S.C. §1981, and the duty of fair representation arising from the Railway Labor Act, 45 U.S.C. §151 et. seq. The action was brought before the Honorable Charles L. Brieant of the United States District Court for the Southern District of New York.

The plaintiffs are three black pilots employed by the defendant, Trans World Airlines, Inc. (hereafter referred to as "TWA"), and members of the defendant union, Airline Pilots Association (hereafter referred to as "ALPA"). The plaintiffs challenge the present operation of the defendants' seniority system which perpetuates the effects of past racial discrimination. The plaintiffs further challenge the present racially discriminatory hiring practices of the airline. They are seeking, on behalf of themselves and the eleven other black pilots in the company's employ, adjustments of their seniority date to reflect the date upon which they would have been hired but for past discrimination, backpay attending the denied promotions and layoffs which they have suffered, and other equitable relief.

PROCEEDINGS BELOW

The plaintiffs first filed charges with the Equal Employment Opportunity Commission on March 24, 1972, amending their charges on June 1, 1972. On November 27-28, 1973, the plaintiffs received their Notices of Right to Sue from the EEOC. This suit was filed on December 23, 1973.

A timely motion for class certification was filed by the plaintiffs but was deferred for subsequent determination by the Court pending its decision with respect to jurisdiction. Discovery was likewise limited by the Court.

An Amended Complaint was filed on March 4, 1974, and motions to dismiss the Complaint were subsequently filed by the defendants. In a decision on October 1, 1974, the court below denied the motions to dismiss, finding that the complaint sufficiently alleged conduct in the nature of continuing discrimination and that the charges filed with the EEOC by the plaintiffs were therefore timely. The court below also found that the plaintiffs' filing of charges with the EEOC tolled the statute of limitations under 42 U.S.C. §1981, concluding that the suit was therefore timely filed under that statute - a proposition which was subsequently reversed in the case of Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

A Second Amended Complaint was filed on December 15, 1975, after the parties had stipulated that certain practices of "current discrimination" stated in the earlier Amended Complaint had been rectified by the defendant airline. The defendants again filed motions to dismiss, arguing that the plaintiffs' administrative charges were not timely filed with the EEOC and that the suit was not timely filed under 42 U.S.C. §1981.

On July 22, 1976, the court below granted the defendants' motions to dismiss the complaint. The court ruled that the plaintiffs' charges to the EEOC were untimely in part and premature in part, and it concluded that the conduct alleged in the Second Amended Complaint was insufficient to be deemed "continuing discrimination." The court also dismissed the alleged violations of 42 U.S.C. §1981 as untimely filed, relying upon Johnson v. Railway Express Agency, Inc., ibid.

The plaintiffs filed their Notice of Appeal on August 20, 1976.

STATEMENT OF THE FACTS

From the time it began doing business until the present, the defendant TWA has discriminated against qualified black applicants for hire as pilots. App. 32. The airline has in its present employ or on furlough only

14 black pilots among its 4,468 pilots, App. 32, and all of these black pilots were hired after July 2, 1965, the effective date of Title VII. App. 32-33.

The treatment which TWA accorded the three named plaintiffs is illustrative of the company's longstanding discriminatory policy. Plaintiff Solomon Cates was fully qualified for hire as a pilot when he first applied for a position on February 28, 1966. App. 29. He was not hired at that time on account of his race and he repeatedly applied after his first rejection. App. 29. He was finally hired as a pilot into the classification of flight engineer on October 17, 1969. App. 29. Plaintiff Jonathan George suffered a similar racially-based delay in hiring, having been hired some three and one-half years after his first application, solely on account of his race. App. 29-30.

Plaintiff James Whitehead, Jr., would have applied for a position as a pilot with TWA in September 1957, at which time he was a pilot with the U.S. Air Force. App. 30. He was dissuaded and prevented from applying with the company at that time, however, because of TWA's well-known policy of refusal to hire black pilots. App. 30. While still with the Air Force, he did apply on March 28, 1966, and was subsequently hired by TWA on May 5, 1967,

into the position of flight engineer. App. 30.

Once hired by TWA, pilots become subject to the terms and conditions of the collective bargaining agreement negotiated by the company and ALPA. This agreement provides that promotions from the position of flight engineer to co-pilot to Captain are controlled by each pilot's date of hire with TWA. App. 32-33. Similarly, whether one is placed on stand-by or regular flight duty, domestic or international flights, and the nature of the aircraft flown, are all governed by one's hire date. App. 32-33. The collective bargaining agreement also contains complex formulae whereby the factors of job classification, flight status and nature of routes and equipment are considered to determine one's rate of pay. Finally, the bargaining agreement provides that pilots shall be subject to furlough, or layoff, in reverse order of their date of hire, commonly referred to as a "last in - first out" seniority arrangement. App. 32-33. Pilots who are furloughed retain their rights to be recalled to active employment with TWA, and these rights are exercised according to the pilot's date of hire. App. 40.

TWA's few black pilots have been consistently placed at a competitive disadvantage vis a vis their white co-workers. Since the airline maintained an absolute color bar both prior to and subsequent to the effective date of

Title VII, no black pilot has managed, under the collective bargaining agreement, to rise to the position of Captain. App. 33. This is because similarly qualified whites were hired upon application in the past and today have a superior date of hire. With their inferior seniority dates, black pilots have been disproportionally subjected to furlough, App. 33, their recall from furlough has been delayed, and they will never enjoy the employment status and corresponding income which they would be receiving had they been white at the time of their application for hire.

Plaintiff Cates was furloughed as a result of his hire date on September 1, 1970, and still awaits his recall from furlough. App. 29. Similarly, plaintiff George was furloughed on October 5, 1970, and has not yet been recalled for active employment. App. 29-30. Had each of them been hired at the time of their initial application, as had their white contemporaries, they would not even have been laid off. App. 46-47.

Plaintiff Whitehead, who was hired prior to plaintiffs Cates and George, has never been furloughed, App. 30, but he has continuously suffered an employment status and income inferior to his white co-workers who were not barred from hire on account of race in the past. Whitehead has consistently lost "other seniority benefits such as an earlier chance at promotion, a choice of flight routes,

type of equipment flown, and scheduling priorities," App. 47, all of which were lost to him within the 180 period prior to his filing an EEOC charge, App. 60, and "(h)e is more likely to be furloughed than would be the case if he had nine years additional seniority which he would have had, in the event that he had applied and been hired nine years earlier." App. 41.

The airline, it is alleged, has never terminated its policy against hiring qualified black pilots, App. 32, although since the effective date of Title VII it has hired a token number of 14 blacks among its 4,468 pilot workforce. App. 32. It has not hired any new pilot employees since 1970, when it temporarily suspended hiring as an economy measure, and its last black pilot was hired in 1969. App. 32, 34.

The plaintiffs first filed their charges with the Equal Employment Opportunity Commission on March 24, 1972. App. 29-31. After having received their Notices of Right to Sue, the plaintiffs filed their initial complaint in a timely fashion, amending it once prior to the present Second Amended Complaint upon which this appeal is based. App. 2, et seq.

The defendants filed motions to dismiss the First Amended Complaint, and the court below denied their motions, finding that the allegations of that complaint sufficiently

set forth continuing violations of the Act. App. 12, et. seq. The Court observed that the fact that TWA had hired no pilots since 1970 was irrelevant to determining whether the plaintiffs stated a continuing violation of the Act.

The Court stated:

"Two of the plaintiffs have been furloughed, not fired. Their recall is possible if the prospects of the airline industry improve. Plaintiff Whitehead is still in TWA's employ. He has an obvious interest in promotion and other benefits which his pleading asserts is being thwarted by racial bias." App. 17.

After reviewing all of the allegations of the complaint, only one (retaliation) of which was omitted from the Second Amended Complaint, the Court concluded, "The complaint is sufficient on its face to make out a claim of a continuing violation." App. 19.

After further conferences with the Court and negotiations among the parties, the plaintiffs and TWA entered into a stipulation and letter of agreement which was subsequently approved by the Court. App. 23-26. The agreement resolved allegations of retaliation and assignment to certain positions not controlled by the seniority agreement. App. 25-26. The agreement provided that the plaintiffs would file an amended complaint - the Second Amended Complaint - which "shall omit any allegations of current discrimination by TWA against plaintiffs or the alleged plaintiff class ... and shall include that prior

alleged discrimination is perpetuated by the seniority provisions of TWA's collective bargaining agreement with ALPA in violation of Title VII of the Civil Rights Act." App. 26. In response to the approval of the court below, the plaintiffs filed the Second Amended Complaint. App. 27, et seq.

Upon the filing of motions to dismiss the Second Amended Complaint, the trial court entered the Memorandum and Order dismissing the complaint which is the basis of this appeal. App. 27, et seq. It considered that the plaintiffs' Title VII claims fell into two categories, "the seniority claim" and "the refusal to hire claim." App. 43-44. The allegations of the complaint were analyzed to determine what, if any, cognizable harm occurred to the plaintiffs within the 180 day period prior to their filing administrative charges with the Equal Employment Opportunity Commission (hereafter, "EEOC"). Apart from its consideration of timeliness, the Court recognized that the claim of past discrimination carried forward by the date of hire seniority system constitutes a claim upon which relief may be granted. App. 46. Although acknowledging that the operation of the seniority system resulted in the layoffs of plaintiffs Cates and George in 1970 and is at present responsible for their delay in being recalled, the Court concluded that the 180 day time limit for filing a charge with the EEOC

commenced with the date of their layoff, rendering their charges to the EEOC untimely. With respect to plaintiff Whitehead, the Court was aware that his wrongful place in the seniority system has consistently denied him "other seniority benefits" such as promotion, flight routes, scheduling and equipment. App. 59. The Court noted that in his case "no single date stands out from which to commence the running of the statutory period." App. 58. Although the Court construed his claim as stating the denial of benefits traceable to his low seniority status within the 180 day period prior to filing an EEOC charge, the Court concluded, "The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges." App. 60-61. The Court did not feel that this on-going denial of rightful place in the seniority system constituted "fresh acts of discrimination." App. 61. Accordingly, all of the plaintiffs' Title VII claims were dismissed as time-barred.

With respect to the Section 1981 claims of the complaint, the Court concluded that three year statute of limitations required by N.Y.C.P.L.R. §214(2) had run prior to the filing of the complaint. App. 61-62.

Implicit in this reasoning is the Court's earlier discussion of the 1970 date of layoff for plaintiffs Cates and George as commencing the running of the statute.

Regarding the "duty of fair representation" claims of the complaint, the Court held that the employer bore no such duty to its employees under the statute, App. 63, and that the union could not be charged with a violation of that duty when the general issue of the racial effects of a date-of-hire seniority system was not definitively determined until the Supreme Court's decision in Franks v. Bowman Transportation Co., 47 L.Ed. 2d 444 (1976). App. 66. Consequently, the fair representation claims were dismissed as well.

ARGUMENT

- I. THE FACTUAL ALLEGATIONS OF THE PLAINTIFFS, AS SET FORTH IN THE SECOND AMENDED COMPLAINT AND AS CONSTRUED BY THE COURT BELOW, SUFFICIENTLY STATE CONTINUING VIOLATIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e et seq., SO AS TO RENDER INAPPLICABLE THE ACT'S 180 DAY REQUIREMENT FOR FILING CHARGES WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Summary of Argument

The plaintiffs have alleged that the company's policy of discrimination in hiring - having affected plaintiff Whitehead prior to the effective date of Title VII and plaintiffs Cates and George after the effective date - has resulted in a denial of their rightful place in the defendants' date-of-hire seniority system. Recent decisions of the United States Supreme Court and of this Circuit construing Title VII establish that the plaintiffs' claims state a cause of action under the Act upon which relief may be granted. The present effects of the past discrimination which was directed toward the plaintiffs constitute continuing violations of Title VII which the court below must consider on their merits.

The plaintiffs have also alleged that the defendant company has never abandoned its policy of discriminating against black applicants for pilot positions. Although the cessation of all hiring since 1970 may result in a

denial of backpay relief to victims of the discriminatory policy, it does not negate the necessity for prospective injunctive relief to insure that when hiring resumes, it is conducted in a non-discriminatory manner.

A. PLAINTIFFS CATES AND GEORGE HAVE ALLEGED CONTINUING VIOLATIONS OF TITLE VII.

Solomon Cates and Jonathan George were hired by TWA in October 1969, some three and one-half years after they first applied for employment with the airline. They have stated that the delay in their hiring was solely on account of their race.

Once hired, the two black pilots became subject to the operation of the seniority agreement negotiated between the defendants TWA and ALPA. This agreement provides that virtually all of the terms and conditions of their employment with the airline are controlled by their date of hire. Promotion through the pilots' ranks from the entry-level position of flight engineer to co-pilot to Captain is controlled by seniority. Competition among pilots for flight status, domestic or international routes, and large or small equipment - all such factors having an impact upon income - is also resolved according to the pilots' date of hire. Finally, the selection of pilots for layoff and their recall for active employment are likewise controlled by their hire dates.

As a result of their having October 1969 hire dates, plaintiffs Cates and George were selected for layoff in 1970, and they have been waiting for recall from layoff ever since. If they had not been discriminatorily delayed in their hiring in TWA, they would not have been laid off.

Recent decisions by the United States Supreme Court and this Circuit have established beyond cavil that if the plaintiffs are successful in proving their factual allegations at a trial on the merits, they will have proven violations of Title VII entitling them to an award of constructive seniority dates reflecting their rightful place in TWA's seniority system as well as other equitable relief.^{1/} Franks v. Bowman Transportation Co., 47 L.Ed. 2d 444 (1976); Acha v. Beame, 531 F. 2d 648 (2nd Cir. 1976); and Chance v. Board of Examiners, 534 F. 2d 993 (2nd Cir. 1976). In addition to defining the substantive facts as alleged by the plaintiffs here as actionable under Title VII, these same cases, and others, clearly demonstrate that the nature of the harm suffered by the plaintiffs is continuing in nature so as to render inapplicable the 180 day time limit which 42 U.S.C. §2000e-5(e) imposes upon the filing of complaints with the EEOC.

^{1/} The exact manner in which the plaintiffs' constructive seniority dates would be applied to enable them to gain their rightful place in TWA's employ has not been prescribed, but should be left for initial determination by the trial court. See, Chance, supra at 999; Acha, supra at 656.

In Franks v. Bowman Transportation Co., supra, the Court was presented with the issue of whether Section 703(h) of Title VII had the effect of restricting the relief available to persons who, because of past discrimination in hiring, did not have their rightful place in their employer's date-of-hiring seniority system. Concluding that the provision did not restrict awards of constructive seniority dates to victims of the past discrimination, the Court stated that it was the continuing effect, existing at present and carrying forward into the future, that was itself actionable under Title VII:

"[T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that back-pay, for example, can never do. 'Seniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past.' . . ." Id. at L.Ed.2d 463-464, footnote 28.

Analyzing the legislative history of Title VII and its 1972 Amendments, the Court concluded that Congress fully intended the Act to provide relief to persons who suffer the continuing effect of a facially neutral seniority system which denies them their rightful place because of past acts of racial discrimination. Id. at L.Ed.2d 461-462, footnote 21. An award of constructive seniority where one's rightful place in the system has been denied on account of race

is "absolutely essential" to obtaining the intended objective of the Act. Ibid.

In U.S. v. Bethlehem Steel Corp., 446 F.2d. 652 (2nd Cir. 1971), the first Title VII case dealing with a seniority system to come before this Court, the decision included a lengthy discussion of the nature of the harm which gave rise to violations of the Act. The Court found that the defendants had engaged in a wide range of discriminatory practices including racial hiring and assignment for many years prior to the effective date of the Act, and that many of these practices were maintained after Title VII became operative. However, the Court's discussion of the present harm centered upon the perpetuation of the effects of that past discrimination through the vehicle of the departmental seniority system. Id. at 658. The Court found that the continuing effect of the facially neutral seniority system in both locking discriminatorily hired and assigned black workers into jobs and preventing their ever reaching their "rightful place" was itself a violation of Title VII. Ibid. The Court stated that, "the continued use of seniority and transfer provisions perpetuated discrimination and therefore violated the Act..." Id. at 659. For as long as this harm continued, violations of the Act continued and required the attention of the courts to fashion relief.

In a subsequent decision in Chance v. Board of Examiners, 534 F.2d 993 (2nd Cir. 1976), this Court again emphasized that it was the effect of a seniority system preventing black workers from reaching their "rightful place" which violates the Act:

"We have followed the 'rightful place' doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971)." Id. at 999.

The principle that it is the continuing effect of any seniority system which perpetuates the effects of past discriminatory practices which gives rise to a cause of action under Title VII was again affirmed by this Court in Acha v. Beame, 531 F.2d 648 (2nd Cir. 1976). The Court reiterated that relief was granted in Bethlehem Steel because of the discriminatory effect of the system, id. at 652, and stated that:

"Moreover, in this case, unlike such departmental seniority cases as Bethlehem Steel, we are not invalidating or altering portions of the seniority system at all. We are merely putting plaintiffs in their rightful place in it. Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of section 703(h)." Id. at 655.

Although the Bethlehem Steel, Chance and Acha decisions of this Court did not involve defenses based upon lack of timeliness of the underlying EEOC charges, they clearly articulated the proposition that if a disability flowing from past discrimination is perpetuated, Title VII is violated. In non-seniority contexts, this Court has approved the concept of "continuing violations" of the Act in the face of defenses based upon lack of timeliness. See, Weise v. Syracuse University, 522 F.2d 397, 410, footnote 20 (2nd Cir. 1975); Egelston v. State University College at Geneseo, 535 F.2d 752, 755 (2nd Cir. 1976); and Noble v. University of Rochester, 535 F.2d 756 (2nd Cir. 1976). Other Circuits as well have applied the concept of "continuing violations" of Title VII to refute objections based upon lack of timely filing with the EEOC, both in cases which involve the perpetuation of past discrimination through the operation of a seniority system, Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976), and cases cited therein, Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969), and in cases where the lingering effects of past discrimination are carried forward into the present by the occurrence of specific events, Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973).

In this case, the court below acknowledged that plaintiffs Cates and George had suffered from the continuing effects of a past discrimination when they were laid off in 1970, and concluded that they should have filed their charges within 180 days of their date of layoff. App. 54-55. Although it was recognized that the two black pilots retain recall rights under the agreement and that they will be recalled earlier if they were to receive their rightful place, the court implicitly held that this was an insufficient level of harm so as to render the plaintiffs "aggrieved parties" within the meaning of the Act^{2/} 180 days prior to the filing of their charge with the EEOC.

The court below advanced several policy reasons in support of its determination that the date of layoff should trigger the time for filing charges with the EEOC. App. 56-58. These reasons include the notions that a layoff occurs on a date certain, that victims of date-of-hire discrimination are expected to perceive the harm done on that date, and that since the relief requested will

^{2/} 42 U.S.C. §2000e-5(b) provides that EEOC charges may be filed only by or on behalf of "a person claiming to be aggrieved" or by a member of the EEOC. The definition of a "person aggrieved" has been construed expansively, and has been held to control whether an individual has proper standing to bring suit. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972), citing with approval Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3rd Cir. 1971).

have some effect upon the expectations of co-workers, the issue should be raised as soon as possible. However, each of the policies has its countervailing policy. Although a lay-off occurs on a date certain, in circumstances where recall is anticipated but delayed because of one's wrongful place in the seniority system, the harm continues past that date into the future. Franks v. Bowman Transportation Co., supra. Some victims of this form of discrimination will certainly perceive the harm done to them on the day of layoff, but Congress itself has found that the perception of racial discrimination flowing from such complex and sophisticated devices as seniority systems is largely beyond the ken of laymen.^{3/} Finally,

^{3/} While considering the 1972 Amendments to Title VII, Congress found:

"In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . .

Employment discrimination, as viewed today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also technical perception that a problem exists in the first place, and that the system complained of is unlawful." (Emphasis added) S.Rep.No. 91-1137, 91st Cong., 2d Sess. 15 (1970).

while the impact upon the expectations of non-victims of discrimination may require some special accommodation by the trial court when relief to victims is granted, it has repeatedly been held that these expectations cannot defeat the awarding of relief altogether. Franks v. Bowman Transportation Co., supra; U.S. Bethlehem Steel Co., supra; and Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

B. PLAINTIFF WHITEHEAD HAS ALLEGED CONTINUING VIOLATIONS OF TITLE VII.

As stated in the Second Amended Complaint and found by the court below, plaintiff James Whitehead, Jr., was dissuaded from applying for employment during the period 1957 to 1966 because of the known discriminatory hiring policy of TWA. As a result, his present claim is that he is being denied his rightful place in TWA's seniority system since white pilots who did not face a color bar during the 1957-1966 period were hired and are far ahead of him in terms of seniority. Although he has had sufficient seniority to withstand layoff, the harm which he is suffering and will continue to suffer is a direct consequence of his wrongful place in the seniority system. He has been denied promotion opportunities, better routes and aircraft, and consequently a higher income.

The court below held that the harm alleged by

Whitehead, even continuing up to the time of his filing a charge, is not actionable under Title VII. App. 59-60. This Court's decision in Acha v. Beame, 531 F.2d 648 (2nd Cir. 1976), was construed "as being limited to an actual layoff." App. 60. Moreover, the court below held that even if Acha were not so restrictive, the harm alleged by Whitehead was inconsequential for purposes of Title VII, stating:

"The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges." App. 60-61.

The court did suggest, however, that plaintiff Whitehead could have preserved a claim of hiring discrimination if he had filed an EEOC charge within 180 days of Title VII's effective date. App. 61.

This Court's decision in Acha v. Beame, supra, clearly contemplates that persons who can prove that they were deterred from application in the past when the discriminatory employment bar was absolute and who were later hired are entitled to constructive seniority if they have been harmed by the lack of it. 531 F.2d at 656. Also, in the decision on rehearing in Chance v. Board of Examiners, 534 F.2d 993,1007 (2nd Cir. 1976), victims

of discrimination in circumstances similar to plaintiff Whitehead's here were afforded constructive seniority in order to face potential layoffs with their "rightful place" seniority. Thus, the trial court's restrictive view of what is actionable under Title VII is thoroughly at variance with prior decisions of this Court. See, Weise v. Syracuse University, 522 F.2d 397, 409 (2nd Cir. 1975).

The Supreme Court has clearly indicated that the continuing effects of past discrimination in the nature of the harm alleged by Whitehead are violations of Title VII. Franks v. Bowman Transportation Co., 47 L.Ed.2d 444 (1967), involved the denial of transfer and expanded job opportunities for the victims of past discrimination in hiring and assignment, rather than the issue of layoffs. The Court there indicated that it was the denial of all of the benefits conferred by seniority to which Title VII was addressed. Id. at L.Ed.2d 462-463. The removal of racially based disabilities affecting future earnings, job security, and advancement prospects were stated to be "absolutely essential" to obtaining Title VII's goal. Id. at L.Ed.2d 462, footnote 21. Prospective relief from the denial of seniority perquisites "cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that backpay,

for example, can never do." Id. at L.Ed.2d 463, footnote 28.

The holding of the court below creating, as it does, a fictional dichotomy between a layoff and an on-going, diminished employment status, is clearly erroneous.

C. THE CONCLUSION OF THE COURT BELOW
THAT TWA HAS CEASED DISCRIMINATING
AGAINST BLACK APPLICANTS IS ERRONEOUS.

The court below erroneously characterized TWA's discriminatory hiring practices as having been "now abandoned." App. 44. It was pointed out that each of the three named plaintiffs were themselves hired, and that, as an economy measure, TWA temporarily ceased hiring altogether in 1970. The conclusion was drawn that "Thus there could not have been any unlawful refusals to hire on the basis of race after that date." App. 45.

The plaintiffs have alleged in their complaint that TWA has always maintained a policy of discriminating against black applicants for hire. App. 32. This is reflected in the company's present employment of only 14 blacks out of 4,468 pilots. App. 32. These statistics alone, if established at trial, would constitute prima facie, if not per se, proof of hiring discrimination. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). These

plaintiffs clearly have standing to raise the issue, despite the fact that they were themselves hired. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3rd Cir. 1971).

The fact that the defendant airline has temporarily suspended its hiring program altogether is in no way dispositive of whether the policy of discrimination, obviously extant prior to 1970, has been discontinued,^{4/} nor is it to be inferred that the company will not enforce its discriminatory hiring policies in the future when hiring resumes. There is no allegation in the complaint or other fact in the record justifying an inference that discrimination at TWA has ceased as a matter of policy. By ignoring the possibility of resumed application of the company's policy, the court below abdicated its "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past," Louisiana v. U.S., 380 U.S. 145, 154 (1965), by failing to insure that "once the formal proceedings have ended the ugly face of bias does not reappear." Rosen v. Public Service Electric and Gas Co., 409 F.2d 775, 781 (3rd Cir. 1969).

^{4/} The suspension of hiring since 1970 may have an impact on relief to be awarded, particularly as Title VII now imposes a 2-year limitation on backpay to victims of discrimination, 42 U.S.C. §2000e-5(g). However, the possibility that some or even all of the affected class members may be denied this form of relief does not constitute a defense to liability or warrant the denial of prospective injunctive relief. See, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

II. THE COURT HAS JURISDICTION TO
CONSIDER THE PLAINTIFFS' CLAIMS
OF 42 U.S.C. §1981 VIOLATIONS.

The Court below considered that the Supreme Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), rendered the plaintiffs' Section 1981 claims ^{5/} untimely filed. This Circuit has repeatedly applied the three year limitations contained in N.Y.C.P.L.R. §214(2) as controlling the filing of suits under certain federal civil rights acts. Romer v. Leary, 425 F.2d 186 (2nd Cir. 1970); Kaiser v. Cahn, 510 F.2d 282 (2nd Cir. 1974); and DeMatteis v. Eastman Kodak, 511 F.2d 306, 311-312, footnote 8 (2nd Cir. 1975), mod. on other grounds, 520 F.2d 409 (2nd Cir. 1975). The trial court applied the three year statute to the claims asserted by the plaintiff, apparently limiting its focus to the 1970 date of discharges of plaintiffs Cates and George, and concluded that suit was not timely filed. App. 61-62.

The trial court's mechanistic approach to the plaintiffs' Section 1981 claims is erroneous for two reasons. First, for the reasons set forth in the preceding Argument, the harm suffered by the plaintiffs is continuing in nature and continued to affect them within the three year period preceding the filing of this suit. Section 1981 has been applied to continuing acts of discrimination, Macklin v.

^{5/} 42 U.S.C. §1981 provides, in relevant part, that "All persons ... shall have the same right ... to make and enforce contracts . . . as is enjoyed by white citizens..." This has been held to apply to claims of racial discrimination in employment, in proper circumstances. Johnson v. Railway Express Agency, Inc., supra.

Spector Freight Systems, 478 F.2d 979 (D.C. Cir. 1973), and this Court has previously established that, "The equitable powers of the district court under 42 U.S.C. §1981 are at least as great as those under Title VII. . . ." Chance v. Board of Examiners, 534 F.2d 993,999 (2nd Cir. 1976).

The second ground for error to the court below in its resolution of the Section 1981 issue is in its very application of the Johnson v. Railway Express Agency, Inc., supra decision. The court applied the Johnson decision retroactively to dismiss the plaintiffs' complaint, which was filed in 1973. The Supreme Court's decision, however, should not have been so applied.

In Chevron Oil Co. v. Huson, 404 U.S. 97 (1975), the Supreme Court articulated the appropriate circumstances for retroactive application of decisions in civil actions. The Court indicated that decisions should not be applied retroactively if they establish a new principle of law, overruling clear past precedent, if retroactive application would retard the operation of the rule in question, and if inequities are created by retroactive application. Id. at U.S. 106-7. Since the date of the 1975 Johnson decision, several courts have applied the factors in Chevron to refuse retroactive application of the rule that the filing of an EEOC charge does not toll the running of the statute of limitations under Section 1981. Hambrick v. Royal Sonesta

Hotel, 403 F.Supp. 943 (E.D.La. 1975); Bush v. Wood Bros. Transfer Co., 398 F.Supp. 1030 (S.D.Texas 1975); and Villarreal v. Braswell Motor Freight Lines. Inc., 11 FEP Cases 831 (S.D. Texas 1975).

In the instant case, it is clear that the Johnson decision was not foreshadowed at the time that the plaintiffs filed their EEOC charges in 1972, operating under the assumption that the statute of limitations under Section 1981 was tolled at that point. Even at the time of Judge Brieant's initial decision on whether the statute was tolled, the Johnson result was unanticipated. App. 19-21. Retroactive application of the decision in this case would result in the court's failing to consider the merits of the civil rights claims of the plaintiffs, a result not within the objective of Section 1981. The inequities of retroactive application of the statute are obvious in this case, as is evidenced by the results in the court below. The court has now required five years' prescience of the plaintiffs which it did not require at the time of its October 1975 Memorandum and Order. It was precisely to avoid inequities such as these that this Court declined to apply its decision retroactively in DeMatteis on rehearing the issue of appropriate Title VII procedures. 520 F.2d at 411. The plaintiffs here should be protected from such an awkward and inequitable result.

III. THE COURT BELOW ERRED IN DISMISSING
ALLEGATIONS REGARDING THE DUTY OF FAIR
REPRESENTATION.

The Second Amended Complaint alleges that both TWA and ALPA have breached their duty of fair representation by negotiating, approving and consistently entering into collective bargaining agreements which perpetuate the effects of the pre-existing racially discriminatory hiring practices of TWA. The holding of the court below that "only the union owes this duty of fair representation to the employees," App. 63 is plain error.

In Richardson v. Texas and New Orleans Railroad Co., 242 F.2d 230 (5th Cir. 1957), the court, in considering and sustaining allegations similar to those in this case, stated:

"It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful. Unless financial responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy implied under Steele will be impracticable of enforcement. For the foregoing reasons, we think the Brotherhood's obligation under the statute does not exist in vacuo, unsupported by any commensurate duty on the part of the carrier." 242 F.2d at p. 236.

This concomitant duty imposed upon both employer and union alike is based upon the provisions of the Railway Labor Act, 45 U.S.C.A. Sec. 151 et seq.

Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944), and a long line of ensuing cases, see, Tunstall v. Brotherhood, 323 U.S. 210 (1944), Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1951), Conley v. Gibson, 355 U.S. 41 (1957), Central of Georgia R. Co. v. Jones, 229 F.2d 648, (5th Cir. 1956), support the thesis that allegations of racial discrimination or of the perpetuation of racial discrimination are, by definition, allegations of that hostile discrimination proscribed by the Railway Labor Act. Accordingly, Vaca v. Sipes, 386 U.S. 171 (1967), App. 64, is not controlling and allegations of bad faith, as is suggested by the court below, are unnecessary.

The agreements invalidated in Steele, Conley and the other cases cited herein were as "facially neutral," App. 66, as those negotiated between ALPA and TWA challenged in this action. The agreements were struck down because of the discriminatory effect of the agreements. The analogy is valid. The Second Amended Complaint alleges that there are 4,453 whites and 14 blacks employed in the flight crews of TWA. App. 32. Prior to 1966, no black crew members were employed. The statistical data is and was sufficient to put ALPA on notice of TWA's discriminatory hiring practices. Notwithstanding this patently clear ratio, ALPA continued to negotiate contracts which it knew or had reason to know would maintain an unequal status quo.

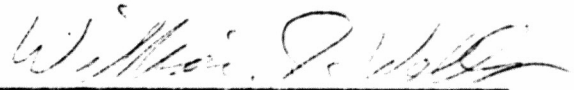
No gift of prescience was required on the part of

ALPA as is suggested by the court below, App. 66, nor is the union relieved from its statutory duty by the recent decision in Franks v. Bowman Transportation Co., 47 L.Ed 2d 444 (1976). While Franks clarified the concepts of constructive seniority for purposes of Title VII, thus dealing with a remedy, it did not alter or innovate long recognized duties of collective bargaining agents imposed by the Railway Labor Act. The allegations of the Second Amended Complaint as to breach of the duty of fair representation by both TWA and ALPA state a cause of action and should be sustained.

CONCLUSION

For the reasons set forth above, the decision of July 22, 1976, of the court below should be reversed in all respects and remanded for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, William D. Wells, Esq., attorney for the Plaintiffs-Appellants herein, hereby certify that I have served copies of the foregoing Brief and Appendix upon counsel for the opposing parties by causing copies of same to be deposited in the U.S. Mail, postage prepaid, addressed to them, this 18th day of October, 1976.

William D. Wells